Fenwick Elliott

The construction law specialists

Issue 109 July 2009

Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Pre Action Protocol - the consequences of failing to raise a point later relied upon

Bovis Homes Ltd v Kendrick Construction Ltd

[2009] EWHC 1359 (TCC)

Kendrick sought a stay of court proceedings to arbitration. Bovis did not object to this, but sought the costs thrown away by Kendrick's failure to raise the arbitration point at an early stage. In particular, Bovis said that such costs included at least some of the costs incurred in the lengthy Pre-Action Protocol process.

Bovis had engaged Kendrick to carry out and complete the design and construction of 48 sheltered housing apartments and three retail units. The contract incorporated the JCT Standard Form of Building Contract with Contractor's Design (1981 Edition). There was no dispute that Article 5 of that Standard Form contained a valid and binding arbitration agreement. The works were completed in about October 1997. Almost nine years later, in June 2006, Bovis put Kendrick on notice of alleged defects in the works. On 11 October 2007, Bovis sent Kendrick what was referred to as "a pre-action letter of claim". This letter set out the details of Bovis' claim and sought agreement from Kendrick that they would rectify the defects identified. Although, this letter was treated as a letter of claim under the Pre-Action Protocol, the parties failed to conduct the protocol process in accordance with the prescribed timetable and no pre-action meeting was ever arranged.

In Kendrick's letter of response, a reference was made to limitation. As a result, Bovis' new solicitors advised that proceedings should be issued for limitation reasons. On 17 March 2009, Kendrick's solicitors both acknowledged service and wrote to Bovis, referring to the contract documents which they had received on 2 March. They said, for the first time, that because of the existence of the arbitration agreement, they wanted the dispute to be dealt with in arbitration. When Bovis' consent was not forthcoming, they issued an application for a stay. One of the aims of the Pre-Action Protocol is to try and ensure that before court proceedings commence:

(i) Each party has provided sufficient information for the other to know the nature of it's case;
(ii) Each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;
(iii) Better and earlier exchange of information occurs; and
(iv) The parties have met formally at least once with a view to defining and agreeing the issues in dispute and exploring possible ways by which the claim may be resolved.

Paragraph 4(ii) of the Protocol notes that if a defendant intends to object to all or any part of the claim on the grounds that the matter should be referred to arbitration then that objection should be raised within 28 days after receipt of the letter of claim. The issue before Mr Justice Coulson was whether or not Kendrick's failure to raise their preference for arbitration at an early stage was a matter for which they should be penalised in costs.

The Judge noted that the Kendrick response was a very detailed document which took a variety of points. It did not say that Kendrick did not have a copy of the Standard Form of Contract, but equally did not request a copy from Bovis. However there were other requests which in the words of the Judge appeared to "operate on the basis that Kendrick did have at least some parts of the contract documentation." The overall impression created by this letter was that Kendrick did have all or at least some of the contract documents, and nothing was said to give rise to a contrary conclusion. No suggestion was made that the claim should be referred to arbitration. Kendrick said that the reason for this was that they did not have a copy of the Standard Form Contract itself. This omission only became apparent in the correspondence subsequently. The Judge disagreed for a number of reasons:

(i) There was no obligation on Bovis to provide a copy of the entire executed contract with their letter of claim. Bovis was entitled to assume that Kendrick had their own copy;
(ii) Kendrick had not requested a copy of the contract.
(iii) Kendrick, as experienced contractors, knew that the Standard Form of Contract was likely to contain an arbitration clause; and
(iv) What appeared to have happened was that the question of arbitration was considered by Kendrick in late 2007/early 2008, and that a decision was taken not to raise it, perhaps because of the absence of the executed Standard Form. The question of arbitration was therefore in Kendrick's mind, but they took a deliberate decision not to raise it.

Accordingly, the Judge considered that Kendrick's behaviour was not in accordance with either the spirit of co-operation required by, or the detailed provisions of, the Pre-Action Protocol. It is important for parties to exchange fully their views, not only on the underlying dispute, but, if relevant, how that dispute should be tried. Whilst, it was accepted by everyone that that did not stop Kendrick from raising the arbitration point now, they were liable for those costs incurred by Bovis, which would not otherwise have been incurred if the stay for arbitration had been referred to in the response letter.

Fenwick Elliott

The construction law specialists

Issue 109 July 2009

Pre Action Protocol - withdrawal from mediation

Roundstone Nurseries Ltd v Stephenson Holdings Ltd

[2009] EWHC 1431 (TCC)

Here, Mr Justice Coulson had to review the relationship between the Pre-Action Protocol process , ADR and parallel court proceedings in the TCC. In doing so, he noted that these relationships often seem to give rise to difficulties including the length of time that the parties allow the process to take, which can significantly increase the costs of the parties.

The dispute revolved around a concrete floor built in 2002 by Stephenson. That floor was found to be defective and Stephenson denied liability saying that the defects were matters of design for which another party, Bridge Greenhouses Ltd, alone were responsible. Round-stone commenced proceedings against Stephenson (and not Bridge) in April 2008. Due to potential limitation difficulties, there was no attempt to comply with the Pre-Action Protocol. As a result, the parties agreed that the proceedings should be stayed to allow that process to be completed. Eventually, it was agreed to mediate, but the mediation was cancelled at the last minute by Stephenson. Consequently judgment in default of defence was entered against Stephenson. That judgment was set aside. However, in the course of that application, Roundstone sought an order that Stephenson pay, on an indemnity basis, the costs thrown away by their late decision to withdraw from the mediation.

The protocol process was certainly protracted. Little happened during 2008. There was no letter of response, no pre-action meeting and, although Roundstone's expert report was repeatedly promised it was not served until 19 December 2008. Some steps were taken in late February to arrange a mediation, which was fixed for 15 April 2009. During March 2009, Stephenson said that their expert report indicated that design was the cause of the problems. They also said that their contract was with Bridge and not Roundstone. Therefore it was important that Bridge attend the mediation. Bridge were approached, but said they needed further information including the Stephenson expert report. The expert report was not served until 7 April and mediation submissions were exchanged the next day. Prior to that, Bridge had said that it would not be attending the mediation. They did not have the necessary documents. As a consequence, Stephenson said that it would not be possible to resolve the dispute. Unless Bridge attended, the mediation would be a pointless exercise. Bridge would not attend and so Stephenson withdrew from the mediation.

As the Judge noted, the position on costs was not straight-forward. The costs of a stand-alone ADR process, do not usually form part of the costs of litigation. Typically parties agree that they will bear their own costs, which means that the costs cannot subsequently be recovered. However, the costs incurred during the Protocol process may, in principle, be recoverable as costs incidental to the litigation. Here, the Judge concluded that the mediation was, and was indeed treated by the parties as being, an integral part of the Protocol process. For example, Stephenson had said that their letter of response would be incorporated into their mediation submission.

Roundstone criticised the failure of Stephenson to provide a letter of response. However, the Judge said that this did not mean that they had failed to comply with the Protocol. Although they had not provided a letter of response, and the Judge thought there was something to be said for providing of such a letter in any event, they had said that they would detail their position in the mediation submission. As the boundaries between the Protocol process and the mediation had become blurred, that was not, here, an unreasonable stance to take.

Further, the Judge noted the Construction Protocol is the only protocol which requires a without prejudice meeting. Often this meeting is held under the umbrella of a mediation. Finally, there was no agreement that the mediation costs would be borne by each party regardless of the outcome. Therefore the Judge held that the costs allegedly thrown away were in principle recoverable. Indeed they were actually recoverable as Stephenson were wrong to cancel the mediation because:

(i) The mediation was an agreed part of the Protocol process and Stephenson were therefore obliged to participate in it;

(ii) Without the mediation, there was no way in which the requirement for a without prejudice meeting between the parties could be fulfilled;

(iii) The mediation was arranged before there was any question of inviting Bridge, and should have gone ahead even without their involvement. Bridge were identified by Stephenson as a possible party as early as June 2008; and

(iv) Bridge did not participate in the mediation because of the late service of Stephenson's expert's report. This was a reasonable position for them to take.

That said, the Judge did not consider that these costs should be paid on an indemnity basis. He said that this "was a bona fide, but incorrect, decision, made perhaps without any real thought of the ultimate consequences." However, both here and in the Kendrick case, the Judge declined to assess the costs thrown away immediately. The assessment of costs thrown away is a matter for agreement or, failing that, a costs judge. Further, any proper assessment of the costs thrown away could not be performed at least until end of the Protocol process. This is because it will not usually be clear until then what costs could be said to have been wasted, and what costs were not.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.co.uk Tel: + 44 (0) 207 421 1986

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

www.fenwickelliott.co.uk